FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

UNITED STATES OF AMERICA, AND

RESPONDENTS

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (App. 339) [1] is reported at 555 F. 2d 938. The order granting in part the Commission's

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[1] "App." citations refer to the joint appendix produced by the petitioners in these cases and in four consolidated cases.

motion for stay of mandate (App. 435) is reported at 555 F. 2d 967. The orders of the Commission (App. 134, 317) are reported at 50 FCC 2d 1046 and 53 FCC 2d 589.

JURISDICTION

The court of appeals entered judgment on March 1, 1977 (App. 432). A partial stay of mandate was granted on April 5, 1977 (App. 435). Petitioners National Association of Broadcasters and American Newspaper Publishers Association filed for writs of certiorari on May 13, 1977, and May 16, 1977, respectively, each invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court granted the petitions on October 3, 1977, and consolidated the cases with Nos. 76–1471, 76–1521, 76–1624, and 76–1685.[2]

QUESTION PRESENTED

Whether, consistent with its statutory mandate and the First Amendment, and in light of changed industry conditions, the Federal Communications Commission may adopt rules prohibiting future newspaper-broadcast cross-ownership in the same geographic area, where these rules are based on the Commission's long-standing policy of furthering the diversification of mass media and there has been no showing that promotion of this policy would result in any public interest harm.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 1, 2(a), 4(i), 4(j), 301, 303, 307, 308, 309 and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 301, 303, 307, 308, 309 and 326, and Section 10(e) of the Administrative Procedure Act, 80 Stat. 381, as amended, 5 U.S.C. § 706. The Communications Act provisions are set forth at App. 27–32. The pertinent regulations of the Federal Communications Commission, 47 C.F.R. §§ 73.35, 73.240 and 73.636, are set forth at App. 243 and 337.

[2] In one of these related cases, No. 76–1471, the Commission appears as a petitioner. Its opening brief in that case has already been filed.

STATEMENT

I. INTRODUCTION AND BACKGROUND

These consolidated cases deal with a 1975 FCC decision amending the Commission's multiple ownership rules [3] to codify, for the first time, standards for licensing of broadcast facilities to owners of daily newspapers serving the same community. These rules prohibit the creation of new co-located newspaper-broadcast combinations,[4] but do not affect existing combinations except where license renewal would perpetuate an effective local media monopoly. In these latter instances, the rules require divestiture of the newspaper or broadcast station.[5]

The Commission's prospective rule, which prohibits the formation of new co-located newspaper-broadcast combinations, was affirmed by the court of appeals. The FCC is a respondent in Nos. 76–1595 and 76–1604, in which the petitioners challenge the affirmance of the prospective rule. We will argue in this brief that the prospective rule should be sustained.

The court of appeals invalidated both the "grandfather" clause which permitted most newspaper owners to maintain their existing affiliation with local broadcast outlets, and the rule which required divestiture where the combination constituted an effective local media monopoly. The court below

[3] *Second Report and Order* (Docket No. 18110), 50 FCC 2d 1046 (App. 134), reaffirmed in all pertinent respects on reconsideration, 53 FCC 2d 589 (App. 317).

[4] The rules do not place a blanket prohibition on a newspaper owner's becoming a broadcast licensee. The rules only operate to bar newspaper-broadcast cross-ownership where the broadcast station and commonly owned newspaper serve the same community. This geographic limitation is operative when a specified signal contour of the station encompasses the entire community in which the daily newspaper is published. The parties do not challenge the basis upon which the FCC determined that the newspaper and broadcast station serve the same geographic area. Appendix F, 50 FCC 2d at 1099–1106 (App. 243–263).

[5] See Appendix F, *id.*

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held that the Commission was required to presume that cross-ownership is contrary to the public interest. In the Commission's opening brief, as petitioner in No. 76–1471, we argued that diversification of media ownership, although it is an important component of the public interest, need not be presumed to override other weighty public interest considerations, such as the public interest in maintaining continuity of service.

Diversification of media ownership as a public interest objective has been reflected for many years in the FCC's multiple ownership rules, as amended,[6] as well as in *ad hoc* comparative [7] and non-comparative licensing proceedings.[8] These earlier multiple ownership rules codified Commission policy that license applications for a new station would be denied, subject to waiver, if a grant of the application would result in certain kinds of broadcast ownership concentration.[9] In circumstances not covered by rule, the Commission processed each application for a new station on a case-by-case basis. Newspaper ownership of broadcast stations fell into this latter category.[10] This was because there were strong public interest reasons for encouraging newspaper publishers to enter broadcasting, notwithstanding the possible effects on media concentration. As a matter of policy, therefore, the Commission found it useful to consider newspaper ownership on an *ad hoc* basis in comparative and non-comparative situations where applicants for new stations were involved. 50 FCC 2d at 1046 n.1, 1050 (App. 135 n.1, 142).[11] Even without a rule, however, a broadcast applicant's other media holdings, including its newspaper interests,[12] could be sufficient in a specific case to warrant outright disqualification,[13] or could be decisive in determining that the license should go to a competing applicant with fewer media interests.[14] After forty years of following this *ad hoc* approach, the Commission decided to reexamine its position to determine whether changes in the industry warranted a different policy.

[6] *Multiple Ownership of Standard Broadcast Stations* (AM radio), 8 Fed. Reg. 16065 (1943); *Rules and Regulations Governing Television Broadcast Stations*, 6 Fed. Reg. 2284 (1941); *Rules Governing High Frequency Broadcast Stations* (FM radio), 5 Fed. Reg. 2382, 2384 (1940); *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 18 FCC 288 (1953), 45 FCC 1476 (1964), 22 FCC 2d 306 (1970) (App. 33).

[7] *See, e.g., McClatchy Broadcasting Co.* v. *FCC*, 239 F. 2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); *Scripps-Howard Radio* v. *FCC*, 189 F. 2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); *Plains Radio Broadcasting Co.* v. *FCC*, 175 F. 2d 359 (D.C. Cir 1949).

[8] *See Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511 (D.C. Cir. 1955).

[9] *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[10] The Commission once considered a rule prohibiting newspaper-broadcast cross-ownership but decided against it at that time. *Newspaper Ownership of Radio Stations* (Notice of Dismissal of Proceeding), 9 Fed. Reg. 702, 703 (1944).

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This is the type of determination which Congress and the courts generally have left to the Commission's discretion. Congress has never adopted legislation specifically addressing newspaper-broadcast combinations, although it has considered such legislation.[15] Nor have the courts required any particular ap-

[11] A non-comparative situation exists when only one applicant applies for a broadcast license. A comparative situation exists when more than one applicant applies for a broadcast station but for technical reasons only one may be authorized. In these situations, the FCC must determine first whether each applicant possesses the necessary threshold qualifications. If more than one applicant is qualified, then a selection is made from among the competing qualified applicants in what is generally referred to as the comparative aspect of the administrative proceeding. *See Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327 (1945).

[12] *See* note 8, *supra*. *See also Allied Broadcasting, Inc.* v. *FCC*, 435 F. 2d 68, 70 (D.C. Cir. 1970).

[13] *See* note 8, *supra*.

[14] *See McClatchy Broadcasting Co.* v. *FCC*, *supra*, 239 F. 2d 15.

[15] *E.g., H.R. Rept. No.* 2426 (Conference Report), 82nd Cong., 2nd Sess. 18–19 (1952) (conference committee omitted House provisions forbidding "discrimination" against newspaper owners in licensing decisions, stating that the FCC was not authorized to "discriminate" against an applicant because of its interest in a newspaper).

proach to cross-ownership,[16] although in recent cases, during the pendency of the Commission's rule making proceeding, they approved the agency's practice of deferring consideration of structural cross-ownership questions to await a final decision in Docket No. 18110. *See, e.g., Hale* v. *FCC*, 425 F. 2d 556, 560 (D.C. Cir. 1970). The Commission's newspaper-broadcast cross-ownership policy thus has evolved administratively as the broadcast industry has matured, its most recent statement coming in the rules now under review.[17]

II. THE COMMISSION DECISION

In its *Further Notice of Proposed Rulemaking*, the Commission invited comment on whether changed circumstances warranted a prospective ban on co-located newspaper-broadcast combinations and dissolution of existing radio-television and newspaper-broadcast combinations through divestiture. 22 FCC 2d 339 (App. 101). The option of limiting new ownership restrictions to prospective effect was consistent with the

[16] *See Pinellas Broadcasting Co.* v. *FCC*, 230 F. 2d 204, 208–209 & n. 6 (D.C. Cir.), *cert denied*, 350 U.S. 1007 (1956). This Court did say, in dictum, that the public interest standard might permit denial of a license application "when the publisher of the sole newspaper in the area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352 (1959).

[17] While the Commission was considering cross-ownership in the proceeding now under review, Congress was having hearings of its own on proposed legislation that included provisions dealing with newspaper-broadcast combinations. Both houses of Congress were aware of the FCC's proceeding. The House adopted legislation that would have forbidden the FCC from considering newspaper ownership at renewal time unless it had adopted rules addressing the matter. The Senate deleted that provision, but directed the FCC to complete its proceeding by 1975. *See H.R. Rept. No.* 93–961, 93rd Cong., 2d Sess., March 26, 1974; *S. Rept. No.* 93–1190, 93rd Cong., 2d Sess., Sept. 27, 1974. See also *Congressional Quarterly Almanac* (Vol. xxx), pp. 714–717 (1974), for a summary of Congressional action on the legislation. Although Congress followed the Commission's proceeding closely, it took no action to change the result through legislation.

Commission's earlier approach in this area, see note 6, *supra*, and involved fewer complications than the divestiture proposal. 50 FCC 2d at 1047 (App. 137). The justification for the proposed new rule was the same as it had been for amending the rules in the past: "promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints . . . ." 22 FCC 2d at 346 (App. 115). However, because the proposed rule would disqualify newspaper owners within a limited geographic area, the Commission asked the parties to address themselves to whether the proposal was within the Commission's statutory authority and was constitutionally permissible. 22 FCC 2d at 349 (App. 121). These were the first questions the Commission addressed in the *Second Report and Order*.

A. THE COMMISSION'S AUTHORITY

Whether it acts in individual cases or through rule making, the Commission must consider the qualifications of a licensee or applicant, and multiple ownership has long been included in that consideration. 50 FCC 2d at 1074 (App. 189). The multiple ownership rules, the Commission explained, rest on two foundations: the related goals of diversity of viewpoints and economic competition. 50 FCC 2d at 1074 (App. 189). In fostering economic competition, the Commission's public interest licensing function draws support from the antitrust laws; in achieving diversity in the marketplace of ideas, its policy is derived from the First Amendment. "The term public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.' *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)." 50 FCC 2d at 1048 (App. 139). The Commission found ample authority to adopt rules in furtherance of its long-standing diversification policy both in the

Communication Act[18] and in the opinions of this Court.[19] 50 FCC 2d at 1048–49, 1074 (App. 138–140, 189).

The Commission rejected the arguments of those challenging the rule as a violation of the First Amendment. As the Commission explained, these parties simply overstated their case when they claimed that the Commission was attempting to inhibit a newspaper owner's freedom to publish by preventing him from having an interest in a broadcast station.

First, the Commission concluded, the rule follows a well-established policy of permitting the Commission to promote diversity of viewpoints consistent with First Amendment principles; second, the First Amendment does not protect the press from lawful business regulation or exempt it from the public interest standard governing the issuance of broadcast licenses; and third, the rule does not prohibit newspaper owners from engaging in broadcasting, but only forbids the creation of new combinations in the same community. This distinction, the Commission further found, does not create an arbitrary and capricious classification based on irrelevant standards in violation of the Fifth Amendment. 50 FCC 2d at 1050 (App. 143). The rule deals similarly with non-newspaper owners who seek to create new co-located media combinations, *e.g.*, television licensees who might apply for another broadcast facility in the same community: "both are barred from doing so." 53 FCC 2d at 592 (App. 324).

The Commission also was not persuaded by the invocation of opinions and discussions by an FCC General Counsel in 1937 and a Commission chairman and members of Congress in the 1940's and 1950's suggesting that the Commission either could not or would not bar newspaper owners from the broadcast field. The Commission stated that it was free to reassess its jurisdiction and its prior policies, as it had done in the cable television area. The Commission pointed out also that these

[18] 47 U.S.C. §§ 152(a), 154(j), 301, 303, 309.

[19] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *United States* v. *RCA*, *supra*, 358 U.S. 334.

early discussions did not focus on the narrow question of newspaper-broadcast cross-ownership in the same community, which is the relevant question in this case. Finally, whatever may have been the views of former Commission personnel and members of Congress many years after adoption of the 1934 Act, the Commission stated that no legislation was ever adopted to govern newspaper cross-ownership and that it is impossible to discern any mandate from Congress on the matter. The Commission said it was responding many years later to changed conditions in the industry and emphasized that it was only barring new newspaper-broadcast combinations in the same area. 50 FCC 2d at 1051 (App. 144–145).

Confident that a newspaper-broadcast cross-ownership rule was within its statutory authority and constitutionally permissible, the Commission turned its attention to "how much diversity to seek in terms of providing the best practicable service to the American public." 50 FCC 2d at 1074 (App. 189–190).

B. THE PROSPECTIVE RULE

As discussed at length in the Commission's opening brief, *see* pp. 10, 13, 22, the record in this proceeding did not show a pattern of abuses arising out of cross-ownership. 50 FCC 2d at 1072, 1085, 1089 (App. 186, 211, 219). For this reason, *inter alia*, widespread divestiture of existing cross-owned combinations was unwarranted. This did not mean, however, that no rules should be adopted, for the record also did not demonstrate a continuing need to encourage new newspaper-broadcast combinations in light of changed circumstances. 50 FCC 2d at 1072–1074, 1079 nn. 27 & 28 (App. 185–88, 199–200 nn. 27 & 28).

The Commission observed that the "broadcast medium ha[d] m .tured," that newspaper owners were no longer the "sole reservoir" of relevant experience, and that the number of broadcast channels remaining open for new licensing had "vastly diminished." Without denigrating the contributions of newspaper owners to the development of broadcasting or suggesting that existing combinations were not serving the public interest, the Commission concluded that its rules should bar

all new licensing that would not add to diversity." 50 FCC 2d at 1074–1075 (App. 190–191). Since the prospective rule could foster diversity without the disruption that would attend dissolution of existing combinations, the Commission found no persuasive countervailing considerations that would require a less restrictive prospective rule.[21]

Thus, finding changed circumstances which no longer required it to encourage or even permit licensing of new newspaper-broadcast combinations, the Commission adopted a flat prospective ban against cross-ownerships, whether created by initial application and construction or by acquisition.[22] The new policy was based on an effort to advance the Commission's long-standing policy of promoting diversification of ownership in the hope that it would offer diversity in the marketplace of ideas—a "worthwhile" goal not dependent on its being "urgent to be justified." [23] The Commission conceded that diversification of ownership offered no guarantee of diversity of viewpoints.[24] However, in the case of future licensing, even a small or "hoped for" gain in diversity was worth pursuing. There would be no disruption

[21] This is not the first time the FCC has balanced the need to develop a broadcast service against the desire to promote diversity. The Commission took the same balancing approach in 1964 when it decided no longer to allow signal overlap situations between commonly owned or controlled stations, a situation accepted in the pioneering days. *Multiple Ownership of Standard, FM and Television Broadcast Stations, supra*, 45 FCC at 1481. In this proceeding, the Commission again took this approach with respect to future AM-FM radio combinations. However, the Commission concluded that conditions had not changed sufficiently to warrant restrictions and that, for the time being, licensees of AM stations would still be encouraged to apply for co-located FM channels. The Commission was mindful that in a comparative proceeding, the applicant with fewer media holdings might be preferred. 50 FCC 2d at 1055 (App. 152).

[22] *Id.* at 1066–1067 & n. 18, 1076 (App. 174–175 & n. 18, 193). The Commission did provide for waiver in exceptional circumstances. *Id.* at 1077 (App. 196).

[23] *Id.* at 1074–1078 (App. 188–196).

[24] *Id.* at 1048, 1076 (App. 138–139, 193).

[25] *Id.* at 1076, 1078 (App. 193, 196–198).

of existing service and the Commission could focus solely on this abstract goal.[25]

Since newspaper owners were not disqualified as a group from becoming broadcast licensees, the rule prohibits only new co-located combinations. The rule operates this way: (1) a single party may not buy both parts of a co-located newspaper-broadcast combination; (2) if a broadcast licensee acquires a daily newspaper in the same market, it must dispose of its license within a year or by the time of its next renewal date, whichever comes later; and (3) no newspaper owner may obtain a license for a broadcast station in the same market, either by transfer or by original licensing.[26] The rule does not affect newspaper ownership of stations outside the community of publication.[27]

III. THE DECISION BELOW

The court of appeals affirmed the prospective rule, holding (1) that a legislative type policy judgment intended to increase diversity was not arbitrary or capricious even though its benefits were speculative; [28] (2) that the Commission acted within its authority in restricting newspaper ownership of broadcast stations by rules; [29] and (3) that a rule forbidding the creation of co-located newspaper-broadcast combinations does not violate press freedoms guaranteed under the First Amendment.[30]

The court of appeals viewed the prospective rule as a natural outgrowth of earlier amendments to the FCC's multiple

[25] *Id.* at 1076 (App. 193).

[26] *Id.* at 1074–76, 1099–1107 (App. 190–193, 243–263).

[27] On petitions for reconsideration, the Commission reaffirmed its rules and policies in all substantial respects. 53 FCC 2d 589 (App. 317). The petitioners then invoked the jurisdiction of the court of appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

[28] 555 F. 2d at 948–951 (App. 365–374).

[29] *Id.* at 951–952 (App. 374–381).

[30] *Id.* at 953–955 (App. 381–388).

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ownership rules, consistent with the Commission's broad mandate to respond to changing conditions, to adopt eligibility standards for licensees, and to encourage a more effective use of communications. 555 F. 2d at 944, 947–948 (App. 350–351, 363). The court agreed with the Commission that the record contained "little reliable 'hard' information." *Id.* at 956–957 (App. 395–396). But it recognized that the rule reflected a "legislative type policy judgment," *id.* at 948 (App. 364), and that similar rules had been adopted in the past without "compiling a substantial record of tangible harm," *id.* at 944 (App. 351). Accordingly, the Commission's decision was not to be disturbed if it was rational and did not exceed the agency's authority or violate the First Amendment. *Id.* at 948 (App. 365).

The court held that the prospective rule has a rational basis because the public interest standard invites reference to the First Amendment principle that dissemination of information from diverse and antagonistic sources serves the public interest. Since there is limited access to the airwaves, the court found nothing irrational in the FCC's attempt "to provide diversity by allocating stations to those without control over an alternative major media voice". *Id.* at 949 (App. 368–369). The fact that gains might be speculative did not, in the court's view, make the attempt irrational. *Id.* at 950 (App. 373).

Making co-located newspaper-broadcast ownership a threshold disqualifying factor to govern future licensing did not exceed the FCC's statutory authority, the court stated, particularly when the importance of diversification had been established. The court held that the Commission's authority to particularize standards by adopting licensee qualifications through the rule making process was settled long ago by this Court in *United States* v. *Storer Broadcasting Co., supra*, 351 U.S. 192. 555 F.2d at 951 (App. 375–376). The court agreed with the Commission that neither a former FCC General Counsel's views in 1937 nor subsequent legislative activity between 1946 and 1952 evidenced a Congressional intent to prohibit the Commission from adopting rules premised on what the public interest might require in 1977. *Id.* at 951–952 & n. 41. (App. 376–378 &

n. 41).[23] As for the dicta in an earlier decision by the same court suggesting that the Commission lacked the authority to ban newspaper owners from becoming licensees, the court distinguished that case as "based on a reading of the Communications Act that has not prevailed." *Id.* at 952 (footnote omitted) (App. 380–381).

Finally, the court of appeals dismissed the claim that the prospective rule violates press freedoms guaranteed by the First Amendment. The denial of a license because the public interest requires it, the court stressed, has been held repeatedly not to be an abridgment of an applicant's First Amendment rights. *Id.* at 953 (App. 382). While the prospective ban may burden the right to publish, that in itself does not make it unconstitutional. The court summarized its First Amendment holding:

> The ban neither mandates nor prohibits what may be published. It only forbids the formation of co-located combinations the Commission has determined do not serve the public interest. Of course, in serving the public interest the ban may indirectly affect the economics of publication, but the First Amendment does not provide a shield against this. *Associated Press* [*supra*], 326 U.S. at 20, 65 S. Ct. 1416.

555 F. 2d at 954 (App. 386–387). In sum, the court of appeals affirmed the validity of the prospective rule in every respect.[24]

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[23] The court summarily rejected the contention that the Commission was attempting to regulate an industry over which it had no jurisdiction. The court emphasized that the prospective rule only imposes qualifications for broadcast licensees, not regulations governing the conduct of the newspaper industry. *Id.* at 952 n. 41 (App. 378 n. 41). Equally unmeritorious was the argument that this rule violated the equal protection clause of the Fifth Amendment. The rule had a rational basis and did not trench upon First Amendment freedoms, thus making strict scrutiny unnecessary. *Id.* at 953 n. 44 (App. 381 n. 44).

[24] In affirming the Commission's prospective rule the court concluded that the future ban was not arbitrary simply because it was based on only one factor. In the court's view, the Commission explained why diversity was an important goal and anchored that explanation to decisions of this Court, 555 F. 2d at 950 n. 33 (App. 373–374 n. 33). *See* Argument, *infra* at pp. 17–20.

SUMMARY OF ARGUMENT

In formulating a prospective rule dealing with newspaper-broadcast cross-ownership, the FCC naturally looked beyond the record of this particular proceeding and drew upon its accumulated experience. This was both necessary and appropriate since the Commission was attempting to provide for the future and had to rely heavily on policy judgments in making its decision. Aware of this reliance on policy, and mindful too that its function was not to substitute its judgment for that of the agency, the court below held that the prospective rule was rational, was within the FCC's statutory authority, and violated no rights protected by either the First or Fifth Amendment. In reaching that conclusion, the court of appeals rejected the challenges of Petitioners ANPA and NAB on the ground that their arguments were based on a reading of the Communications Act which has not prevailed.

A. Over the last forty years the Commission's multiple ownership rules, as amended, have proscribed common ownership of broadcast stations within defined geographic areas and have placed a ceiling on the overall number of stations which could come under common control by a single entity. These rules are justified in the public interest because they seek to prevent monopoly of the economic marketplace and to encourage a maximization of diverse viewpoints—objectives which find support in the nation's antitrust laws and the First Amendment.

These same considerations have long justified taking newspaper ownership into account in deciding whether to grant new licenses, both in non-comparative and comparative situations. Indeed, newspaper ownership became a relevant, well-established and judicially approved public interest factor long before the subject rule making proceeding was initiated. Previously, though, there was good reason for not banning co-located newspaper-broadcast cross-ownership at the threshold, for newspaper ownership provided a valuable source of applicants experienced in journalistic traditions at a time when the broadcast industry was in its infancy.

The Commission determined in this proceeding, however, that circumstances had changed. Newspaper owners were no

longer the sole reservoir of relevant experience; the pioneering spirit they were encouraged to bring to the industry was no longer needed from new applicants. Moreover, broadcasting remained an unusual medium, the number of channels available for use being severely limited. Indeed, it was for this reason that the diversification policy rationally furthered the public interest in having access to diverse news and opinion sources. The prospective rule merely extended the multiple ownership rules to consider newspaper ownership. The policy of promoting diversity outweighed the need to continue to solicit entry by other media owners to develop what was no longer an infant industry. This response to changed conditions was entirely rational, particularly since it would not cause any disruption to existing services operating in the public interest.

B. In 1934, Congress, through the Communications Act, granted the FCC broad discretion to regulate broadcasting in the public interest. Subsequent Congressional activity in the 1940's and 1950's should not be construed as diminishing that discretion. It is true that individual members of Congress during that period expressed reservations about the FCC's authority to bar newspaper-broadcast cross-ownership.[28] Ultimately, however, the wide discretion originally conferred in the Act was left unaltered. Any contrary suggestions—either by Congress or the judiciary—were subsequently put to rest by this Court's affirmation of the FCC's authority to adopt rules to bar at the threshold applicants with other media outlets. *See United States* v. *Storer Broadcasting Co., supra*, 351 U.S. 192.

C. The possibility that the prospective rule indirectly burdens the publishing of a newspaper does not mean that this rule unconstitutionally trenches upon protected press freedoms guaranteed by the First Amendment. The rule simply represents a judgment by the Commission as to when it is in the public interest to grant a broadcast license. There

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[28] On the other hand, more recent Congressional activity apparently endorsed that authority. This is why interpretations of a law by members of a different Congress many years later usually have little significance.

is no First Amendment right to broadcast comparable to the right of every individual to speak, write or publish; rather, it is the right of the public which controls. Therefore, denial of a broadcast license, if deemed necessary to serve the public interest, is not a denial of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

Moreover, these regulations do not attempt to scrutinze what is said or to stamp out expression. Placing broadcast licenses in the hands of those without alternative means of expression is an established public interest broadcast policy based upon furthering a legitimate governmental interest. Indeed, it is the First Amendment which supports that policy. Just as the First Amendment does not provide the press with an exemption from the commands of other statutes, *e.g.*, the antitrust laws, so it does not grant a publisher immunity from the public interest standard of the Communications Act. And since this rule does not affect only newspapers, but also bars a television licensee from acquiring another broadcast station in the community in which he already broadcasts, it rests on a reasonable classification consistent with the due process clause of the Fifth Amendment.

ARGUMENT

Once the FCC has made its public interest determination, the narrow question on judicial review is whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414, 416 (1971). On review, the wisdom of the rule is not at issue, *National Broadcasting Co.* v. *United States, supra*, 319 U.S. at 224. That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem [of deciding how the public interest will be served] to the latter." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). *See Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, 401 U.S. at 416. When

an agency's decision is based primarily on policy considerations it is even more to be respected; in fact, it is "entitled to the greatest amount of weight by appellate courts." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947).[24]

In reviewing the Commission's rule prohibiting future formation of co-located newspaper-broadcast combinations, the court below assumed the proper role of a reviewing court. Aware that the prospective rule reflected a "legislative type policy judgment," it reviewed the decision only to insure that the regulation was not arbitrary or capricious and that it did not exceed the Commission's authority or violate the First Amendment. 555 F. 2d at 948 (App. 364–365). The court found no error in the Commission's decision. We believe the court of appeals' decision in this regard was entirely correct.

THE RULE PROHIBITING FUTURE NEWSPAPER-BROADCAST COMBINATIONS IN THE SAME CITY IS RATIONAL, LAWFUL AND BASED UPON RELEVANT PUBLIC INTEREST FACTORS

A. It was well established before this rule making proceeding began that newspaper ownership was a relevant public interest consideration in the Commission's licensing scheme

The purpose of the Communications Act is to protect the public interest in communications. *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 14 (1942). This Court, in its earliest opinions construing the Act, recognized that Congress intended for the Commission, in regulating broadcasting in the public interest, to act to preserve competition and prevent monopoly. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474–476

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[24] In reviewing the "grandfather" clause and limited divestiture rule the court also recognized that the Commission's decision had to be based primarily on policy considerations. 555 F. 2d at 957. (App. 396). When it came to reviewing those rules, however, the court elevated diversity from a very important public interest factor to a virtually irrebuttable presumption against cross-ownership. The Commission has argued in its opening brief, No. 76-1471, that this was error.

(1940). The Commission was not to be only a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 215. The Commission had broad authority to carry out its public interest licensing functions, Sections 1, 4(i), 301 and 303 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 301 and 303, and this broad authority provided the basis for rules dealing with concentration of media control, despite the absence of specific provisions in the Act. *National Broadcasting Co.* v. *United States, supra,* 319 U.S. 190 (chain broadcasting regulations); *United States* v. *Storer Broadcasting Co., supra,* 351 U.S. 192.[35] The public interest standard of the Communications Act invited reference to the nation's antitrust laws [36] and the First Amendment,[37] and these Commission actions promoting diversified ownership of the mass media drew support from both. Diversification of media ownership had been an important regulatory goal in part because of the Commission's disability, 47 U.S.C. § 326, and traditional reluctance to review particular programming decisions.[38] In attempting to secure diversity without government supervision of speech, the Commission had looked to the ownership by license applicants of interests in other media, including CATV, AM and FM radio, TV, motion pictures and newspapers. *See Allied Broadcasting, Inc.* v. *FCC, supra,* 435 F. 2d at 70.

Newspaper owners were never disqualified from owning and operating broadcast stations. In fact, many of them were

[35] *See also General Telephone Co. of the Southwest* v. *United States,* 449 F. 2d 846 (5th Cir. 1971) (telephone companies prohibited from owning CATV systems in their telephone service areas); *Mt. Mansfield Television Inc.* v. *FCC,* 442 F. 2d 470 (2d Cir. 1971) (prime time access, financial interest, and syndication rules).

[36] *United States* v. *Radio Corporation of America, supra,* 358 U.S. at 351; *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 222-224.

[37] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 122 (1973).

[38] *Selling of the Pentagon,* 30 FCC 2d 150 (1971); *see also Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 127.

pioneers in developing both radio and television, bringing both media needed revenues and journalistic tradition. Diversification was only one important public interest factor, and for a long time did not outweigh the public interest in encouraging the development of the media by those most likely and willing to step forward.[39] And in renewal proceedings, where existing cross-owners with affirmative records of service in the public interest sought renewal of their licenses, diversification has been regarded as less important than the established service record.[40]

In the past, the Commission's position was that while a blanket prohibition did not serve the public interest, newspaper affiliation was a relevant consideration in determining the comparative qualifications of applicants for a new facility.[41] Diversification of mass media was, in this context, an appropriate consideration for the Commission in the exercise of its public interest licensing function. *See Plains Radio Broadcasting Co.* v. *FCC, supra,* 175 F.2d 359. *Accord,*

[39] Because FM radio has not sufficiently matured, the Commission has decided not to bar the grant of an FM station to an AM licensee in the same city. It concluded that AM owners might be the most likely parties to apply for FM channels which might otherwise remain silent. 50 FCC 2d at 1054-1055 (App. 151-152).

[40] *See* 50 FCC 2d at 1087-1088 (App. 214-218); *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 n. 1, 394-395 (1965); *Coules Floridia Broadcasting, Inc.,* 62 FCC 2d 953, 956-958 (1977), *appeal pending sub nom. Central Florida Enterprises, Inc.* v. *FCC,* No. 76-1742 (D.C. Cir.); *Policies Relating to the Broadcast Renewal Applicant,* 40 Pike & Fischer Rad. Reg. 2d 763, 775-776 (1977), *review pending sub nom. National Black Media Coalition* v. *FCC,* No. 77-1500 (D.C. Cir.) *Cf.* S. Rept. No. 44, 82nd Cong., 1st Sess. 7 (1951); H.R. Rept. No. 1750, 82nd Cong., 2d Sess. 8 (1952). These congressional reports explain the 1952 amendment deleting a former provision in Section 307(d) of the Communications Act, 47 U.S.C. § 307(d), which stated that the same considerations must apply to both renewal applications and original applications.

[41] *Policy Statement on Comparative Broadcast Hearings, supra,* 1 FCC 2d at 394-395.

Scripps-Howard Radio v. *FCC*, *supra*, 189 F. 2d 677; *McClatchy Broadcasting Co.* v. *FCC*, *supra*, 239 F. 2d 15. *Compare Stahlman* v. *FCC*, 126 F. 2d 124 (D.C. Cir. 1942). *See* discussion at pp. 22–23, *infra*. The diversification criterion could be decisive in comparative license hearings. *McClatchy Broadcasting Co.* v. *FCC*, *supra*.

Even in a non-comparative proceeding, an applicant's newspaper interests were relevant in determining whether grant of another station to a multiple media owner would be in the public interest. *Clarksburg Publishing Co.* v. *FCC*, *supra*, 225 F. 2d 511. In fact, this Court has suggested that in an appropriate case antitrust considerations alone might keep the statutory public interest standard from being met, "as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *RCA*, *supra*, 358 U.S. at 351–352.

In light of this history, the prospective rule was not a sudden reversal of Commission policy, but rather a change in emphasis in conformity with the developing public interest standard. *Cf. General Telephone Company of the Southwest* v. *FCC*, *supra*, 449 F. 2d at 864 n. 17. The court below found that barring newspaper-broadcast cross-ownership was a rational outgrowth of the Commission's long-standing and judicially endorsed diversification policy. Although the Commission had conceded that diversification of ownership may not guarantee diversity of viewpoints, the court heeded this Court's teaching that regulations are not irrational even though " 'the possible benefits of competition do not lend themselves to detailed forecast. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96. . . .' " 555 F. 2d at 950 (App. 373). In sum, the rationality of granting licenses to those without alternative means of expression in the same community was well established long before this prospective rule was adopted.

B. The prospective rule does not exceed the FCC's statutory authority simply because newspaper ownership is now brought within its ambit

In former years it was in the public interest to encourage newspaper owners to apply for vacant channels. Conditions had changed, however; the industry had matured, there was a scarcity of available channels remaining open for new licensing, and other qualified and experienced applicants could be expected to step forward. Even if the prospective rule provided only a small gain in diversity, that was a worthwhile goal since there were no countervailing public interest factors to outweigh its singleminded pursuit, 50 FCC 2d at 1066 n. 18, 1067, 1075–1076, 1078 (App. 174 n. 18, 175, 190–193, 197). The decision to proceed by rule making rather than defer the entire problem to the uncertainties of case-by-case adjudication was a choice which "lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery*, *supra*, 332 U.S. at 203.

In *United States* v. *Storer*, *supra*, 351 U.S. 192, this Court upheld a portion of the FCC's multiple ownership rules as consistent with the Commission's authority to announce by rule "its attitude on public protection against [concentration]." 351 U.S. at 203. Petitioner ANPA argues that neither the Communications Act (Sections 47 U.S.C. 309(a), 303(r), 154(i)) nor the *Storer* decision, which only involved limitations on the total number of broadcast stations licensed to a single entity, supports the FCC assertion of authority to ban newspaper owners from applying for a broadcast station.[42]

This argument is misconceived. Petitioner ANPA concedes that diversity was well-established as one of many factors bearing on the public interest.[43] From there, however, peti-

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[42] *See* petitioner's brief in No. 76–1604 at pp. 29–34.

[43] ANPA brief at p. 31. It is not at all clear whether petitioner is arguing that newspaper ownership may only be considered as one of many relevant factors in a comparative proceeding between qualified applicants, *see, e.g.*, *McClatchy Broadcasting Co.* v. *FCC*, *supra*, 239 F. 2d 15, or whether ANPA agrees that such ownership can be a proper factor for disqualifying an unopposed applicant, but only in the course of an administrative hearing. *See, e.g., Clarksburg Publishing Co.* v. *FCC*, *supra*, 225 F. 2d 511. Whichever interpretation is correct, it is clear that petitioner challenges the FCC's authority to adopt a rule making a newspaper owner ineligible for a grant of a

tioner proceeds on the assumption that it must forever remain only one of many factors. Once the Commission determined that the public interest would not be served by creating any new, co-located newspaper-broadcast combinations, however, the court of appeals correctly stated that it "requires no extension of *Storer*" to sustain the Commission's "statutory authority to impose the prospective ban." [44] The significance of *Storer* is not limited to its affirmance of the specific ownership rules at issue, but extends to its recognition of agency authority to bar at the threshold, without a hearing, those who do not meet public interest qualifications. To interpret the case otherwise would, as the court below stated, deprive the FCC of its lawful authority to adopt licensee qualifications. *See* 47 U.S.C. § 308(b).[45]

Equally unavailing is the reliance placed by petitioners on dicta contained in the 1942 decision of the court of appeals in

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license in the city where its newspaper circulates. As discussed above, this contention is without merit.

[44] 555 F. 2d at 951 (App. 376).

[45] 555 F.2d at 950–951 n. 33 (App. 373–374 n. 33). In *U.S.* v. *Storer, supra,* it appears that this Court recognized that the Commission acts properly when it considers diversification as both a comparative factor and for the purpose of codifying threshold licensee qualifications. 351 U.S. at 203 n. 12.

Petitioner NAB in No. 76–1595 at brief pp. 23–24 argues that *Storer* restricts the Commission's rule making authority to limitations on the number of stations licensed to one entity and does not permit FCC regulations concerning newspaper publication, a field over which, according to petitioner, the Commission has no authority. Petitioner NAB cites the decision in *GTE Service Corporation* v. *FCC*, 474 F. 2d 724 (2d Cir. 1973), in support of its position that the Commission has no jurisdiction over newspapers. The analogy fails. First, the Commission exercised no such jurisdiction; it only set forth standards governing its own radio and television licensing function. Second, the rules here are not designed to protect newspapers from unfair competition. In *GTE*, the Second Circuit struck down Commission regulations which appeared to have this intent with respect to the data processing industry, an industry over which the Commission admittedly had no jurisdiction. And third, the Second Circuit specifically distinguished the case before it from others where the Commission properly was concerned with competitive implications in markets over which it had jurisdiction, 474 F. 2d at 734, citing *Mansfield Journal Co.* v. *FCC*, 180 F. 2d 28 (D.C. Cir. 1950). The court of appeals below also rejected this argument. 555 F. 2d at 952 n. 41. (App. 378 n. 41).

Stahlman v. *FCC, supra,* 126 F. 2d at 127, stating that the FCC lacked statutory authority to impose a ban on newspapers as such.[46] First, the dicta was unnecessary, for, as the concurring Judge noted, common control of newspapers and broadcast stations was not at issue. Second, this early decision did not give the issue of cross-ownership the type of considered analysis which should have been controlling or persuasive in the type of case which was before the same court in this proceding. *See National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F. 2d 601, 619–620 (D.C. Cir. 1976). More importantly, however, as the court below correctly stated, ". . . *Stahlman* was based on a reading of the Communications Act that has not prevailed." 555 F. 2d at 952 (App. 380–381). *See id.* at n.43 (App. 381 n.43.). It is evident from the later reliance upon *Stahlman* in *Storer Broadcasting Co.* v. *United States*, 220 F. 2d 204, 208 & n. 1 (D.C. Cir. 1955), *rev'd, United States* v. *Storer, supra,* 351 U.S. 192, that the court of appeals labored under the misconception that the FCC generally lacked the statutory authority to adopt rules providing for the disqualification of applicants on the basis of a particular factor, be it newspaper ownership (as in *Stahlman*) or other broadcast interests (as in *Storer*). This misreading of the Act was based on the notion that, with only limited exceptions, license applications could not be denied except on a case-by-case basis and after a full hearing. This interpretation was later squarely rejected by this Court. *United States* v. *Storer, supra,* 351 U.S. 192.

Finally, petitioners mount an assault against the validity of the prospective rule by claiming that both a legal opinion by the FCC's General Counsel in 1937 and Congressional activity between 1943 and 1952 indicate that the FCC lacks the statutory authority to adopt the prospective rule.[47] The construction of the Act which petitioners wish to infer from these

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[46] *See* petitioner's brief in No. 76–1604 at pp. 37–38; petitioner's brief in No. 76–1595 at pp. 16–17.

[47] *See* petitioner's brief in No. 76–1604 at pp. 34–37; petitioner's brief in No. 76–1595 at pp. 18–20.

statements subsequent to its passage is simply not supported, however, by opinions of this Court, the court of appeals and even more recent Congressional activity.

Petitioners present no evidence of legislative intent by those responsible for passage of the 1934 Communications Act that the public interest standard could never permit a ban against co-located newspaper-broadcast combinations. To the contrary, "[u]nderlying the whole law" is the recognition that broadcasting is a dynamic field and that the administrative process must possess "sufficient flexibility to adjust itself" to this reality. *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 138.

A former General Counsel's 1937 views on the limits of the FCC's statutory authority are also not conclusive. For many years the Commission assumed it lacked the statutory authority to regulate cable television. When it finally asserted jurisdiction—even after unsuccessful attempts to secure legislation—the reversal of its prior position was sustained by this Court. *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 164, 170 (1968). In any event, the former FCC General Counsel stated only that the Commission had no authority to deny licenses to newspaper owners as a matter of "public policy." He suggested at the same time that the Commission had authority to deny an application by a newspaper owner if, on the basis of all the facts, a grant would not serve the public interest. (App. 449). *See* 50 FCC 2d at 1051 (App. 144).[48]

Although the Congressional activity between 1943 and 1952 does indicate concern by subsequent Congresses that the Commission not bar newspaper owners as such from broadcasting, it does not provide guidance on the question whether the Commission has the authority to ban new newspaper-broadcast cross-ownership within the same community. The Commission rejected the argument based on this prior Congressional activity, primarily on the strength of its mandate to respond to changing conditions rather than to freeze as a matter of

[48] *See also* 555 F. 2d at 951–952 (App. 376–378).

statutory law what might have been viewed as in the public interest twenty-two years earlier. 50 FCC 2d at 1051 (App. 144–145).

The court of appeals agreed with the Commission's analysis and, in addition, it rejected petitioner ANPA's arguments on the broader ground that views on the meaning of a statute by another Congress many years later have little significance. 555 F. 2d at 952 n. 41 (App. 378 n. 41).[49] The wisdom of this approach finds support in recent Congressional activity, during which the relevant House and Senate Committees were explicitly aware of the Commission's newspaper cross-ownership rule making proceeding and voiced no objection. Indeed, the House passed legislation which would have prevented consideration of cross-ownership at renewal time unless the FCC had first adopted rules governing cross-ownership. The Senate deleted that provision in its version of the legislation, but directed the FCC to complete its rule making proceeding by 1975. *See H.R. Rept. No. 93–961,* 93rd Cong., 2d Sess. (1974); *S. Rept. No. 93–1190,* 93rd Cong., 2d Sess. (1974). *See also Congressional Quarterly Almanac* (Vol. XXX), pp. 714–717 (1974). Again, although Congress closely observed the Commission's rule making and had hearings of its own at the very time the Commission was holding oral argument in its docket, Congress adopted no legislation with regard to newspaper cross-ownership. The most that should be inferred from the Congressional activity subsequent to 1934 is that Congress has left the Commission with the wide discretion originally conferred in the Act[50] by the Congress responsible for its adoption.[51]

[49] *United States* v. *Wise,* 370 U.S. 405 (1962). See also *United States* v. *Southwestern, supra,* 392 U.S. at 170.

[50] See *NBC* v. *U.S.,* supra, 319 U.S. 190.

[51] Putting aside the question of what interpretive weight should be accorded subsequent legislative attempts to amend a statute, it is not altogether clear that the Congressional activity between 1946 and 1952 even purported to view the FCC's authority as limited along the lines argued by petitioner. First, to the extent that Congress at that time viewed a ban against newspaper-broadcast cross-ownership unwise as a matter of public policy, its views only shed light on what policy it did not want the FCC to

Judicial opinions since this legislative history in the 1940's and early 1950's strongly support the Commission's statutory authority to codify its attitude on the public interest standard as it relates to newspaper-broadcast cross-ownership. *See, e.g., U.S.* v. *Storer, supra,* 351 U.S. 192; *Clarksburg Publishing Co.* v. *FCC, supra,* 225 F. 2d 511; *Greater Boston Television Corp.* v. *FCC,* 444 F. 2d 841, 859–860 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). Where, as here, there is no "compelling evidence" of a contrary Congressional intent, this Court should not prohibit regulations "imperative for the achievement of an agency's ultimate purposes." *U.S.* v. *Southwestern Cable, supra,* 392 U.S. at 177, quoting from *Permian Basin Area Rate Cases,* 390 U.S. 747, 780 (1968).

C. The prospective rule promotes rather than impedes constitutional guarantees under the First Amendment in furtherance of a legitimate governmental objective

The Commission is authorized to grant and to renew broadcast licenses only when the public interest, convenience and necessity will be served thereby. 47 U.S.C. § 307(a); *see FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. 134. We have argued elsewhere in this brief that the Commission has properly concluded that it would not be in the public interest to grant a license to a new applicant who already owns another major communications outlet in the particular community involved, be it another broadcast facility or a daily newspaper. In view of this determination by the Commission, this Court's language in *National Broadcasting Co.* v. *United States, supra,* is dispositive of petitioners'[92] First Amendment attack upon the Commisison's rules:

> The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

319 U.S. at 226–227.

Broadcast frequencies are a scarce resource and therefore must be portioned out among applicants. Because of this scarcity, however, the courts long and consistently have recognized that the First Amendment has a meaning for broadcasting that is different from its meaning for other media of expression.[93] Thus, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 388. The First Amendment goal in broadcasting is an informed public.

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adopt rather than on whether the FCC had the statutory authority to do so. Even as a matter of policy, however, it is not altogether clear what rule Congress feared the Commission might adopt. It seems abundantly clear that it did not seek to deprive the Commission of its authority to deny a broadcast application to a newspaper owner where it would create a monopoly situation contrary to the public interest. *See* 98 Cong. Rec. 7399. This Court made the same observation, also relying, in part, on the House debates on the 1952 amendments. *United States* v. *RCA, supra,* 358 U.S. at 351–352. To the extent that Congress was concerned that there be no ban against newspaper owners as such, the Commission heeded that desire; the rules only affect newspaper owners seeking a station in the same city. It does not appear that Congress ever intended to deny the FCC the discretion to redefine the public interest in response to changed conditions. In the House debates on one proposed anti-newspaper disqualification amendment, *see* petitioner's brief in No. 76–1604 at p. 43, there was clear recognition that the important thing "is that the Commission should determine these applications solely on what is best for the convenience and necessity of the public." 98 Cong. Reg. 7399, *supra.*

[92] Petitioner ANPA's brief in No. 76–1604 at pp. 17–34; petitioner NAB's brief in No. 76–1595 at pp. 25–37.

[93] *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 388; *CBS* v. *DNC, supra,* 412 U.S. at 101; *Virginia Pharmacy Bd.* v. *Virginia Consumer Council,* 425 U.S. 748, 773 (1976); *Capitol Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd sub nom. Capitol Broadcasting Co.* v. *Acting Attorney General,* 405 U.S. 1000 (1972).

The "paramount right" belongs neither to the broadcasters, *id.*, nor to people who want access to broadcast facilities to expound their own views, *CBS* v. *DNC*, *supra*, 412 U.S. at 121–132. Rather, it is the right of the viewers and listeners that is paramount. As this Court succinctly put it in *Red Lion*:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

395 U.S. at 390. *Compare Red Lion*, *supra*, 395 U.S. 367, and *CBS* v. *DNC*, *supra*, 412 U.S. 94, with *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). And the Commission's view concerning how best to regulate in furtherance of the public's paramount right can change over the years because, in this Court's words, "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS* v. *DNC*, *supra*, 412 U.S. at 102.

Petitioners' arguments seem to start from the assumption that newspaper owners have a special immunity from the public interest standard. Newspaper publishers, however, are not excused from the reach of valid regulatory policies, including the Commission's diversification policy. *See Associated Press* v. *NLRB*, 301 U.S. 103, 122–132 (1937); *Associated Press* v. *United States*, *supra*, 326 U.S. 1.[54] Indeed, the Commission's rules, designed to assure a diversity of viewpoints for the public, are not merely constitutionally permissible, but affirmatively promote First Amendment objectives. *Associated Press* v. *United States*, *supra*, 326 U.S. at 20; *See also* Judge Learned Hand's District Court opinion in the *Associated Press* case, 52 F. Supp. 362, 372 (S.D.N.Y. 1943); *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390; *National Association of*

[54] This Court has routinely upheld application to the press of a variety of other laws. See *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 382–383 (1973) and cases cited therein.

Theatre Owners v. *FCC*, 420 F. 2d 194, 208 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

More than anything else, the First Amendment means that the Government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) (citations omitted). The regulations here, if anything, are farther from the primary concern of the First Amendment than comparable rules which have been upheld.[55] The prospective rule does not scrutinize what is said or attempt to stamp out expression. Nor does it attempt to deny anyone the right to publish.[56]

Petitioners simply cannot claim a wholesale exemption from the Commission's rules merely because they engage in publishing. Indeed, their argument was rejected long ago:

> Just as the First Amendment does not provide the press with immunity from the commands of the antitrust laws, so a newspaper, when it stands as an applicant for a radio license, may not rely on the First Amendment to

[55] *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, *supra*; *Mt. Mansfield Television, Inc.* v. *FCC*, *supra*, 442 F. 2d 470; *National Association of Independent Television Producers and Distributors* v. *FCC*, 516 F. 2d 526 (2d Cir. 1975).

[56] Petitioner ANPA in No. 76–1604 at pp. 18–19 argues that these regulations burden the press in the same manner as the regulations struck down in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) and *Spieser* v. *Randall*, 357 U.S. 513 (1958). The court of appeals correctly found the reliance misconceived. In *Grosjean*, a tax was deliberately imposed to limit circulation of information to the public, "precisely the opposite" of what is imposed here. 555 F. 2d at 953 (App. 384). In *Speiser*, *supra*, 357 U.S. at 519, a tax exemption was conditioned directly on signing a loyalty oath, a condition which was intended to suppress constitutionally protected speech. 555 F. 2d at 954 n. 47 (App. 385–386 n. 47). A tax exemption is significantly different from obtaining a license contingent upon public interest findings. Moreover, the regulations here are not conditioned on suppressing one's ideas. The regulations only condition the privilege of broadcasting on having no ownership interest in a local newspaper. The right to publish a newspaper still exists. Exercising one's right to publish a newspaper, however, does not carry with it the right to demand that the FCC disregard the public interest in the granting of broadcast licenses.

> compel the Federal Communications Commission to disregard [the] public interest in considering its application. The mere fact of newspaper ownership has been held relevant in determining the qualifications of an applicant. *Plains Radio Broadcasting Co.* v. *Federal Communications Commission* [*supra*], 175 F. 2d 359.

Mansfield Journal Co. v. *FCC*, *supra*, 180 F. 2d at 35.[57] It is clear that the First Amendment does not exempt the press from incidental burdens, *Branzburg* v. *Hayes*, 408 U.S. 665, 682–683 (1972), and even if the prospective rule is such a burden, it achieves a valid regulatory purpose under the public interest standard. The press has no special immunity from its applicability.[58]

Petitioner ANPA also argues that a rule against licensing a newspaper owner to operate a television or radio station in the same community in which the newspaper is published violates the due process clause of the Fifth Amendment.[59] More specifically, it says that the rules single out newspaper owners from eligibility for broadcast licenses without furthering a legitimate government interest. The argument is unsound.

In the first place, a newspaper owner is not barred from becoming a broadcast licensee; he is prohibited from doing so only in the same community in which he owns a newspaper. *See General Telephone Co. of Southwest* v. *United States*, *supra*, 449 F. 2d at 860. For present purposes, the only other persons in the community who stand on the same footing as newspaper owners are the owners of radio

[57] In the *Mansfield* case, the court affirmed the Commission's denial of a radio license to a newspaper applicant who had a record of attempting to suppress competition. Rejection of the applicant's First Amendment argument did not, however, appear to depend on the particular facts of the case, but rather, on the conclusion that denial of a license, if valid under the Act, is not a denial of First Amendment rights.

[58] *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 49–50 n. 55 (1976) (contrasting First Amendment violations in the Federal Election Campaign Act of 1971 with broadcast regulations designed to improve the quality and volume of coverage of public issues).

[59] Petitioner's brief in No. 76–1604 at pp. 27–29.

or television stations, and the rules under attack generally [60] apply equally to newspaper owners and radio or television owners.

Persons in those categories are treated differently for licensing purposes from other persons in their respective communities for reasons "wholly [related] to the objective of [the Communications Act]," thus making the classification reasonable. *Reed* v. *Reed*, 404 U.S. 71, 75–76 (1971). It is no longer open to doubt, as discussed elsewhere in this brief, that an objective of that Act is to regulate broadcasting with a view towards assurring for the public a diversity of viewpoints. It is therefore proper for the broadcast licensing agency to distinguish between those who already have the means for reaching the public and others who do not. In short, there is clearly "an appropriate governmental interest suitably furthered by the differential treatment." *Police Department of Chicago* v. *Mosley*, *supra*, 408 U.S. at 95 (citations omitted). *Cf. City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as that decision sustained the FCC's prospective rule.

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[60] An AM–FM co-located combination continues to be permitted. See notes 20 and 39, *supra*. But television-radio combinations are prohibited just as newspaper-radio and newspaper-television cross-ownerships are barred.

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